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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JOE HAROLD FLINT, JR., Petitioner.	2 CA-CR 2009-0050-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20070670, CR-20073842, and CR-20080777

Honorable Edgar B. Acuña, Judge

REVIEW GRANTED; RELIEF DENIED

Robert J. Hirsh, Pima County Public Defender
By Kristine Maish
Tucson
Attorneys for Petitioner

P E L A N D E R, Chief Judge.

¶1 Pursuant to a plea agreement, petitioner Joe Flint was convicted of the sale or transfer of a narcotic drug, a class two felony. The trial court found that Flint had committed this offense while he was on probation in two separate matters and that he had seven prior felony and nine prior misdemeanor convictions. The court revoked Flint's probation on the

two prior matters, imposed concurrent, presumptive, five-year sentences, and affirmed the $2,000 in fines, $400 in attorney fees, and $1,600 in surcharges it had previously imposed. For the most recent conviction, the court imposed a concurrent, partially aggravated, 6.5-year sentence and imposed an additional $2,000 fine, $400 in attorney fees, and a $1,680 surcharge.[1] Flint filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., that the trial court summarily denied. This petition for review followed. We will not disturb a trial court's denial of post-conviction relief absent a clear abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶2 Flint first argues the trial court abused its discretion by imposing a partially aggravated sentence for his last conviction. He seems to suggest that, by considering his criminal history, which he contends was motivated by his drug addiction, the court essentially treated his addiction as an aggravating, rather than a mitigating, factor. He asks that we vacate his partially aggravated 6.5-year sentence or reduce it to the presumptive term of five years.[2] "A trial court has broad discretion to determine the appropriate penalty to impose upon conviction, and we will not disturb a sentence that is within statutory limits . . . unless it clearly appears that the court abused its discretion." *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). We will find an abuse of sentencing discretion only if the

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[1]The surcharge presumably was imposed pursuant to A.R.S. §§ 12-116.01(A) through (C), 12-116.02(A), and 16-954(C). Although Flint was assessed additional fees in both matters, he does not challenge them.

[2]Although Flint refers to his sentence as both 6.5 and seven years, according to the record, it is 6.5 years.

court acted arbitrarily or capriciously or failed to adequately investigate the facts relevant to sentencing. *State v. Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d 1158, 1160 (App. 2001). It is within the court's discretion to determine how much weight to give any factors in aggravation or mitigation. *State v. Atwood*, 171 Ariz. 576, 648, 832 P.2d 593, 665 (1992), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001).

¶3 The trial court denied Flint's sentencing argument for the following reasons:

> The Petitioner asserts that certain facts, specifically the defendant's severe addiction problems, may be considered as mitigation. *State v. Williams*, 134 Ariz. 411, 656 P.2d 1272 ([App.] 1982). The Appeals Court in *Williams* states that while a history of addiction can be a mitigating factor, it is not the only relevant factor to be looked at, specifically identifying that an "extensive criminal record" and the apparent "gross disrespect of our legal system" are aggravating factors which the trial court could properly consider. *Williams* at 413, 656 P.2d 1274. The Court, in imposing an aggravated sentence, considered on the record both the Petitioner's problems with addiction as well as his extensive criminal history. . . . The Petitioner does not assert the existence of factors that the Court failed to consider while sentencing him. Considering this fact in light of the Court's broad discretion during sentencing, the Court will not now amend it[]s prior decision.

¶4 Previously, at sentencing, defense counsel had reminded the trial court about Flint's addiction problems. The court told Flint it had previously placed him on probation with the hope that he would "go into residential treatment," stating: "I gave you the opportunity [to be placed on probation] thinking that you would take advantage of the services provided, and you didn't do that." The record is clear that the court imposed the sentence it did only after considering Flint's addiction and his criminal history. Because nothing in the record suggests the court failed to consider the facts relevant to sentencing or

otherwise acted arbitrarily or capriciously, we cannot say it abused its discretion in the first instance or in denying post-conviction relief.

¶5 Moreover, to the extent Flint suggests the trial court was obligated to consider his substance abuse as a mitigating factor under A.R.S. § 13-701(E)(2)[3] (court shall consider as mitigating factor evidence that, at the time of the offense, a defendant's "capacity to appreciate the wrongfulness of [his] conduct or to conform [his] conduct to the requirements of law was significantly impaired"), he is incorrect, particularly where he has failed to show a connection between his substance abuse and his behavior at the time of the crime. *See Williams*, 134 Ariz. at 414, 656 P.2d at 1275. In any event, substance abuse is not automatically mitigating.

¶6 Flint also challenges the imposition of $4,880 in "discretionary" surcharges and $1,200 in attorney fees. He asks that we either vacate all of the surcharges or at least waive the $1,680 surcharge imposed in the latest matter and that we vacate or reduce the $1,200 in attorney fees. He claims he cannot afford to pay the amounts ordered and that they "run counter to the goals of rehabilitation." He also contends the trial court failed to first evaluate his ability to pay before imposing the fees and surcharges. In its ruling denying relief, the court refused to waive or reduce the amounts ordered, noting that they were within the statutory limits.

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[3]Significant portions of the Arizona criminal sentencing code have been renumbered, effective January 1, 2009. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes, *see* 2008 Ariz. Sess. Laws, ch. 301, § 119, we refer in this decision to the current section numbers rather than those in effect at the time of the offense in this case.

¶7 Notably, Flint did not object to the imposition of the fees or surcharges at sentencing. Nor does it appear that he did so at the change-of-plea hearing or in response to the recommendation in the presentence report that fees and surcharges be imposed. In the absence of any objection below, we review solely for fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id*., *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). Therefore, to obtain relief, Flint must demonstrate not only that such error occurred, an argument he has not raised in this post-conviction proceeding, but also that he was prejudiced by it. *Id.* ¶ 20.

¶8 A trial court may order a defendant to repay the costs of his legal defense. *See* A.R.S. § 11-584(B)(3) (defendant may be required to "repay . . . a reasonable amount . . . for the cost of the defendant's legal defense"); Ariz. R. Crim. P. 6.7(d) (permitting court to impose costs of legal services on defendant in "such amount as it finds he or she is able to pay without incurring substantial hardship to himself or herself or to his or her family"). A court may also impose fines and surcharges based on the offenses involved. *See* A.R.S. §§ 12-116.01 (penalty assessments); 12-116.02 (same). Some of these provisions either require or permit the court to consider the defendant's financial status. *See* §§ 11-584(C) (when requiring defendant to repay costs of legal defense, court "shall take into account the financial resources of the defendant and the nature of the burden that the payment will impose"); 12-116.01(F) (permitting trial court to waive nonmandatory fines and penalty

assessments if court believes payment "would work a hardship on the persons convicted . . . or on their immediate families"); 12-116.02(D) (same).

¶9 Flint argues the trial court was required to consider the amount he was able to pay without causing a hardship to him or his family before imposing attorney fees and that, although not required to consider the hardship factor before imposing the surcharges, the court nonetheless abused its discretion by imposing those discretionary amounts. As we noted in *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 9, 185 P.3d 135, 139 (App. 2008), before imposing fees pursuant to § 11-584(B)(3) and (C) and Rule 6.7(d), a trial court is required to make specific factual findings regarding a defendant's ability to pay the fees imposed, including whether payment will cause a substantial hardship. *See also State v. Taylor*, 216 Ariz. 327, ¶ 25, 166 P.3d 118, 125-26 (App. 2007). Although it is unclear what financial information the trial court had before it, based on the record before us, it does not appear the court here made any express findings regarding Flint's financial status. However, as we held in *Moreno-Medrano*, a court's failure to make such a finding when imposing attorney fees is not fundamental error. 218 Ariz. 349, ¶ 13, 185 P.3d at 139. In addition, Flint was responsible for requesting a waiver of the otherwise mandatory surcharges under §§ 12-116.01(A) through (C) and 12-116.02(A), something he did not do.

¶10 At sentencing, the trial court stated it had reviewed the original presentence report and the addendum thereto. The individual who had prepared the report noted that, after Flint was released from jail in January 2008, he had worked three hours daily at the rate of $7.15 per hour helping to remodel a restaurant. Flint reported having "no debts, assets,

or receipt of general assistance." The author concluded "the defendant does have the ability to contribute to the cost of his legal defense" and recommended that the court order Flint, inter alia, to pay $400 in attorney fees and a surcharge of $1,680. At sentencing, defense counsel did not object to the court's having reviewed the presentence report, and he stated he had nothing to add at the conclusion of the hearing. The record simply does not support a finding that the court's imposition of the fees or surcharges constituted fundamental error. *See Henderson*, 210 Ariz. 561, ¶¶ 22, 24, 115 P.3d at 608. In the absence of such error, we will not disturb the court's unchallenged imposition of fees and surcharges.

¶11 Although the petition for review is granted, relief is denied.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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PHILIP G. ESPINOSA, Judge